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No. 82-2071

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEO A. DREY AND KAY K. DREY, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

	Page
Cases:	
<i>Coleman v. United States</i> , 704 F.2d 326	5
<i>Lewis v. Reynolds</i> , 284 U.S. 281	1
<i>Messing v. Commissioner</i> , 48 T.C. 502	5
<i>Sharp v. United States</i> , 191 U.S. 341	3
<i>United States v. Janis</i> , 428 U.S. 433	4, 5
Constitution and statute:	
U.S. Const. Amend. V (Taking Clause)	3
Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):	
Section 170	1, 3
Section 170(c)(1)	2
Miscellaneous:	
Rev. Rul. 76-376, 1976-2 Cum. Bull. 53	4

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Petitioners seek review of the decision of the court of appeals affirming the district court's judgment that they failed to sustain their burden of proof in this tax refund action. At issue is a charitable deduction taken by petitioners under Section 170 of the Internal Revenue Code of 1954, 26 U.S.C. 170, for donating 961.47 acres of real property to a charitable foundation. The Internal Revenue Service determined that the land had a fair market value of \$45,000; petitioners claim the value is significantly higher. The taxpayer bears the burden of proving that the Internal Revenue Service assessment is invalid (*Lewis v. Reynolds*, 284 U.S. 281 (1932)). The sole issue is a factual one of valuation and does not warrant further review by this Court.

The pertinent facts, as found by the district court (Pet. App. A9-A13), may be summarized as follows: Petitioners Leo A. and Kay K. Drey were the owners of 26 noncontiguous tracts of riverfront property along the banks of the

Current and Jacks Fork Rivers in southeastern Missouri. The tracts, which are at least 800 feet deep, are wooded and unimproved except for one abandoned schoolhouse and various roads and trails. In 1970, petitioners conveyed an Exchange Scenic Easement Deed to the United States under which they retained the underlying fee but granted to the government an easement in each of the 26 tracts running for a distance of 300 feet back from the low water marks of the rivers. Petitioners retained an unrestricted fee interest in all of the upland acreage beyond the 300-foot point. In all, the property covered by the easement consisted of 961.47 acres. By the deed, petitioners covenanted to permit ingress and egress by the general public over the land for any purpose not inconsistent with the easement, and to refrain from construction, improvement, dumping, or commercial or industrial activity on the land.¹ The government agreed to permit petitioners, their heirs, successors, and assigns to retain their rights of ingress and egress over the land (Pet. App. A9-A11).

In 1974, petitioners conveyed their retained fee interest in the 961.47 acres encumbered by the scenic easement to the L-A-D Foundation, Inc.² On their income tax return for that year, petitioners claimed a charitable contribution deduction for the transfer in the amount of \$275,000. Upon audit, the Internal Revenue Service determined that the fair market value of the property contributed to the L-A-D Foundation was \$45,000 and assessed petitioners an additional \$160,650 in taxes and \$57,804.29 in interest (Pet.

¹Petitioners retained the right to harvest timber on the property, subject to approval by the National Park Service (Pet. App. A10).

²The L-A-D Foundation, Inc. (the initials of which stand for Leo A. Drey) was organized exclusively for public and charitable purposes within the terms of Section 170(c)(1) of the 1954 Code (Pet. App. A11).

App. A11). Petitioners paid the assessment and brought suit for refund in the United States District Court for the Eastern District of Missouri. Petitioners' two valuation experts testified at trial that the value of the fee underlying the scenic easement was "minimal" (Pet. App. A12). However, they assigned a value to the gift in the respective amounts of \$270,000 and \$280,000 on the theory that the value of petitioners' retained upland tracts was diminished to that extent by loss of a right of access to the river.

The district court denied petitioners' claim for refund, finding that they had failed to sustain their burden of showing that the Commissioner's determination was incorrect. The court rejected their theory that severance damages to the retained lands should be considered in valuing the donated land (Pet. App. A18). The court of appeals affirmed (*id.* at A4-A7).

1. Petitioners argue (Pet. 10-12), as they did in the court below, that taxpayers may take into account any decrease in the value of contiguous property when computing the fair market value of property donated to charity. Petitioners support this argument by analogy to valuation of property for purposes of compensation under the Takings Clause of the Fifth Amendment. This argument was properly rejected by the courts below.

When property is condemned or otherwise involuntarily taken, the individual is entitled under the Constitution to an award equal to the value of the land taken, as well as an award for any diminution in value that may result to the portion which remains (*Sharp v. United States*, 191 U.S. 341, 351-352 (1903)). This principle, however, does not apply to a voluntary donation of land to charity. Condemnation seeks to measure what is *taken from* the property owner; Section 170 seeks to value what is *given to* the transferee. As the court of appeals stated (Pet. App.

A6): "[T]he value of the taxpayers' charitable contribution must be determined by the value of the property donated and not by severance damages to the adjacent land."³

In any event, as the court of appeals noted (Pet. App. A5 n.2), petitioners' claim that their access to the river was diminished by the transfer is contradicted by the terms of the scenic easement deed, which guarantees rights of ingress and egress to the general public over the donated lands.⁴

2. Petitioners also contend (Pet. 7-10) that the government failed to provide a minimal evidentiary foundation for its assessment. Citing *United States v. Janis*, 428 U.S. 433 (1976), they assert that the usual rules placing the burden of proof on the taxpayer in refund suits are not applicable. Petitioners contend that the government presented no evidence to refute certain testimony presented by them that the timber on the land donated to the L-A-D Foundation had a value of \$140,000 (Pet. 8). To the contrary, that testimony was contradicted by the government's valuation expert, who testified in detail that the property had a value for

³The same result is reached under an application of Rev. Rul. 76-376, 1976-2 Cum. Bull. 53, which concluded that the value of an open space easement covering part of a tract of land may be computed as the difference in fair market value of the entire tract before and after grant of the easement, and that the value of a subsequent charitable donation of the land encumbered by the easement is the fair market value of the donated land in its encumbered state with no additional allowance for severance damages to retained land. This Revenue Ruling was cited to the court of appeals (Br. for Appellee 2, 17), but was not relied upon in its decision.

⁴Petitioners candidly admitted in their brief in the court of appeals that the "severance damages" they seek are in fact the value of the "leverage" the owner of the riverfront property would have over access to the backlands (Br. for Appellants at 26-27). But all control over ingress and egress over the riverfront tracts was ceded at the time of the Scenic Easement Deed. By petitioners' own reasoning, the value of their 1974 transfer should not include severance damages, since the transferees gained no "leverage" over access to the backlands.

timber management purposes of \$45,000.⁵ The gist of petitioners' argument is simply that a principal government witness overlooked significant facts in arriving at a valuation figure for the standing timber. Even if wholly valid, therefore, their contention would establish no more than that a trier of fact would have been justified in rejecting the government's evidence in favor of a somewhat higher valuation.

United States v. Janis, supra, does not support petitioners' claim. In *Janis*, this Court held that the burden of proof is on the government where the government's case is based solely on "a 'naked' assessment without *any* foundation whatsoever" (428 U.S. at 441) (emphasis in original). In this case petitioners can claim no more than that the government assessment may have been mistaken. As petitioners admit, the government's valuation was based upon an on-site inspection by a professional appraiser, aided by aerial photographs, interviews, and market data (Pet. 3-4). Valuation is "an issue which should be frankly recognized as inherently imprecise * * *. [E]ach case turns on its own particular facts." *Messing v. Commissioner*, 48 T.C. 502, 512 (1967). No further review of the valuation dispute in this case is warranted.⁶

⁵The government's appraiser concluded that the value of the timber on the donated lands was \$70,187.31. He discounted that sum by a factor of 45%, to take account of the timber harvesting restrictions in the Scenic Easement Deed and the difficulty of access to the scattered sites. To this sum — \$38,500 — the appraiser added \$7,000, the agreed value of a tract improved by an abandoned schoolhouse. Pet. App. A12-A13.

⁶Petitioners' reliance on *Coleman v. United States*, 704 F.2d 326 (6th Cir. 1983), is misplaced. There, several years after the assessment was made and before trial, both the taxpayers' and the government's records were destroyed. The Sixth Circuit found that the parties had stipulated that the assessment was not based on any evidentiary foundation and concluded, therefore, that the taxpayers had met their burden of showing that the government's assessment was arbitrary.

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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